No. 20,641

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA
and BAKER AIRCRAFT SALES, INC.,
Defendants, Appellants and Cross-Appellees,

vs.

BETTY K. FURUMIZO,
Plaintiff, Appellee and Cross-Appellant.

On Appeal from the United States District Court
for the District of Hawaii

ANSWERING BRIEF ON BEHALF OF CROSS-APPELLEE BAKER AIRCRAFT SALES, INC.

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ANSWERING BRIEF ON BEHALF OF CROSS-APPELLEE BAKER AIRCRAFT SALES, INC.

I. THE COURT BELOW ERRED IN HOLDING DEFENDANT, BAKER AIRCRAFT SALES, INC. LIABLE.

Cross-appellant argues that because Shima was the licensed pilot, his employer is liable as a matter of law where a crash such as this occurs. If this is in fact the law, it seems a bit unusual that no case so holding by the Federal Courts has been cited to support it. The one case relied upon is that of *Lange v. Nelson-Ryan Flight Service, Inc.*, 259 Minn. 460, 108

N.W. 2d 428 (1961). That case, as pointed out in our opening brief, is in conflict with the case of *Haddon v. Atkinson,* Civil No. 1023, Circuit Court, Third Circuit, State of Hawaii, where a crash occurred while a plane was operating on an instrument clearance under instrument weather conditions and only one of the two pilots had an instrument rating. The court nevertheless held that neither could recover from the other.

Cross-appellant in her brief contends that Hawaiian precedent should not be followed and cites cases from jurisdictions where lower court decisions are not recognized by other courts at the same judicial level as precedents. However, cross-appellant cites no case holding that such is the rule in Hawaii. The common law of Hawaii is established under Sec. 1-1 R.L.H. 1955 which provides:

> "The common law of England as ascertained by English and American decisions is declared to be the common law of the Territory of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the Territory, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; . . ."

It will be noted that the Statute in question does not refer alone to decisions by the Supreme Court of Hawaii. The Statute was first adopted in 1892 and as the early volumes of the Hawaiian Reports show, prior to that date it was the custom to report decisions of Justices of the Supreme Court acting

at the nisi prius level as well as decisions by the court acting at the appellate level. Thus, the Statute obviously contemplated that trial decisions would be precedents in Hawaii. For example, the case which established a widow's right of action for the death of her husband in Hawaii, *Kake v. Horton,* 2 Hawaii 209 (1860) was a decision at the trial level rather than on appeal.

Cross-appellant argues that plaintiff's Exhibit 7, the report filled out by George R. Carter listing Shima as the pilot, establishes that he was at the controls as a matter of fact. Yet, as the trial court noted at the time:

> "It's obvious that he couldn't know that of his own knowledge." (Tr. 808-809.)

She argues that there was a finding that Shima was in fact negligent. The decision of the court below will be searched in vain for such a finding.

At page 4 of her brief cross-appellant cites the exchange between her counsel and the court at the hearing on the motion for a new trial. The comments of the court at that time are certainly not findings since a court simply cannot amend its decision in such a manner. If cross-appellant desired to have additional findings she should have followed the provisions of Rule 52 (b) Hawaii Rules of Civil Procedure and requested additional findings. To simply walk into court and ask the court, without notice and without reducing the requested findings to an intelligible form, to change its decision in order to frustrate a motion

for a new trial does not fall within the scope of the provisions of the Rules of Civil Procedure. And to have the court do so obviously only compounds the error which the court made when it permitted an issue not fairly raised by the pretrial order to be the deciding factor in the case.

Cross-appellant argues that Baker is on the horns of a dilemma in this case with respect to the so-called two findings of negligence. Cross-appellee Baker takes the position that it is cross-appellant who is on the horns of a dilemma, for obviously a finding that Shima was improperly trained with respect to wake turbulence excludes logically a finding that he negligently took off knowing the dangers of wake turbulence. The two are inconsistent, and no amount of soothsaying can change that fact.

Cross-appellant claims to rely upon the testimony of Joseph Eshleman Jones. However, the material upon which cross-appellant relies was stricken by the court. (Tr. 1345.) The material at page 1331 which is relied upon has to do with the instruction given to students, not the instruction given to instructors. The cross-examination relied upon does not deal with the standards of training instructors, as a reference to the material cited will show. (Tr. 1351-1354.)

No one is attempting to overcome the liberality of the rule on amendments, but Baker is most vociferously contending that it did not have its day in court on the issue of the standards for the training of instructors because that issue was not present in the

pleadings, nor in the pretrial order, nor in the trial. It was injected by the court below in its decision fourteen months after the trial ended.

II. THE COURT BELOW ERRED IN FAILING TO FIND THAT THE DECEDENT, ROBERT FURUMIZO, WAS CONTRIBUTORILY NEGLIGENT.

There appears little need to go over again the material cited and relied upon in appellant Baker's opening brief. Nothing which cross-appellant has said detracts from the argument there set forth. Therefore, the argument appearing at pages 27 and 28 of appellant Baker's opening brief is respectfully called to the Court's attention.

III. THE COURT BELOW AWARDED ERRONEOUS AND EXCESSIVE DAMAGES.

As pointed out in appellant Baker's opening brief, the court below awarded promotions to the decedent which the evidence did not justify and which even the cross-appellant's counsel admitted was beyond what he could make a strong contention for. Despite this fact cross-appellant now contends that the evidence justified the court's findings awarding the decedent two promotions, from GS7 to GS9 and subsequently from GS9 to GS11. She cites *Ginoza v. Takai Electric Co.*, 40 Hawaii 691 (1955) where the Hawaii Supreme Court upheld an award of damages and in so doing noted that the decedent would prob-

ably have developed into a first class mechanic. That finding, however, was supported by the evidence in the case. Here the standard laid down in *Condron v. Harl,* 46 Hawaii 66 (1962) was not met.

Cross-appellant also cites *Rohlfing v. Moses Akiona, Ltd.,* 45 Hawaii 373 (1961) but that case merely holds that the estate of a deceased four-year-old has a cause of action for damages. It does not attempt to measure the damages or go into how they can be proved.

The other points argued in cross-appellant's brief are sufficiently covered in appellant Baker's opening brief.

IV. NONE OF THE POINTS RAISED BY CROSS-APPELLANT ON CROSS-APPEAL URGING AN INCREASE IN THE AMOUNT OF DAMAGES AWARDED ARE MERITORIOUS.

A.

There was no error in failing to adjust the special damages to compensate for the decrease in the value of the dollar through the period of decedent's life expectancy.

Cross-appellant's brief argues that:

> "Based upon numerous authorities, including the unequivocal statement in 25 C.J.S., Death, Sec. 100 at page 1242 that 'Damages should be increased in proportion to the diminishing purchasing power of the dollar,' taken together with the testimony of Myles Grover (the actuary called by the plaintiffs) relating to Chart II, BS. F.P.M. Supp. 992 (Exhibit P-44), there is both a testimonial basis in the record as well as a legal basis for taking into account the future

anticipated decreasing value of the dollars resulting in necessary increases in salaries."

Cross-appellant calculates that the purchasing power of the dollar will decline so that in each year after 1965 we will need 3.3 cents more than in the previous year to buy what a dollar would buy in 1965. Thus, they calculate that $1.033 in 1966 will buy what $1.000 bought in 1965, while $1.066 in 1967, $1.495 in 1980, and $1.825 in 1990 will be needed to buy a dollar's worth of goods in terms of today's money. The fundamental assumption is that in calculating cross-appellant's support for future years, we must take into account that the dollars of those future years will be less than today's dollars in real purchasing power.

Cross-appellant's calculations contain a fundamental error; they are not supported by law or fact; and even accepting their erroneous theory, are miscalculated.

Cross-appellant's fundamental error is that she has not applied her assumption across the board. If the calculation had the reasoning behind the figures added, they would run something like this: Calculating on today's pay scale Robert Furumizo would have made $10,465.00, including C O L A, in 1990, which reduced to present value is $3,597.87, but because of inflation $1.825 will be necessary in 1990 to have the purchasing power of one of today's dollars. Therefore, $1.825 in 1990 is the equivalent of $1.000 in 1965, and

$6566.11 in 1990 is the equivalent of $3597.87 in 1965, so we need $6566.11 to replace the lost earnings for 1990. From this point cross-appellant's fallacy is easy to see. The $6566.11 she asks are the inflated 1990 dollars, but the judgment cross-appellant seeks is that such dollars are to be paid now, not in 1990; and in today's dollars, not in 1990 dollars. Thus, to calculate the equivalent of $6566.11, we must divide by $1.825 and we get $3597.87, which brings us back to where we started. This will be true no matter what factor we assume to represent inflation. The future equivalent in purchasing power of one dollar of today's money must of logical necessity be one dollar when expressed in terms of today's money.

Cross-appellant introduced no evidence that the 3.3% trend which she was able to detect in the Federal pay scale would continue. She called no economist as an expert witness to say that this would be so, or to explain what had caused the trend. Her expert, Mr. Grover, said it was not within his limits of expertise to say what causes wage increases (Deposition of Myles Grover, page 25), or whether they will continue (page 27).

Without being economists ourselves, we can out of common knowledge say that the prediction of economic trends is a very risky business. Even for the near future, there are nearly as many predictions as there are economists. It is probably safe to assume that the changing purchasing power of the dollar has some correlation with the change in government

wages, but cross-appellant has introduced no evidence of what the changes in the purchasing power of the dollar will be, or even what they have been. There are numerous indices of the cost of living and it takes an economist to choose between them and explain the significance of each. Cross-appellant has not offered one.

Using a layman's approach, we know that the years 1928-1945 were years of great economic stress. They began with the great boom of the late twenties, went through the 1929 crash, the great depression, and the strong inflationary pressures that followed. According to cross-appellant's theory Congress would have followed these trends. What actually happened? Nothing. In 1930, in the depths of the depression, Congress actually gave its employees in the lower bracket, equivalent to GS7, a small raise. Otherwise Federal pay scales remained absolutely unchanged for these seventeen years of violent economic change. Of course, this was because Congress was trying to counteract the economic pressures, but it shows how successfully Congress can do so.

As cross-appellant's own expert recognized, the question of what will happen to Federal wage rates is very much speculation as to what changes Congress will make in the law. (Deposition of Myles Grover, page 27.) This is the testimony of cross-appellant's only witness on this point, and the testimony is that he does not know. As a matter of fact, cross-appellant failed to (1) Produce any expert economic testimony;

(2) Produce any evidence of the changing value of the dollar; (3) Produce any evidence that Federal wages must follow the changing value of the dollar.

As a matter of law, cross-appellant says her argument is based on numerous authorities, but fails to cite any in her brief except 25 C.J.S., Deaths, Sec. 100, page 1242 and Time Magazine.

The cases to which the C.J.S. statement refer are comparison cases; that is, cases in which appeal courts judged the propriety of remittitur by comparing the amount of the verdicts before them with verdicts which they had either affirmed or remitted in other cases. Where the earlier case was an old one, the court allowed for the change in the real value of money. Cross-appellant has not cited a single case in which a prediction of future decreases in the value of the dollar has been used to increase the amount of the judgment as she seeks to do here. It might be pointed out that the 3.3% figure was calculated by using a base year of 1923 and going forward on a straight arithmetic progression through 1964. Cross-appellant shifts the base year to 1965, and this is totally out of accord with her calculations because the 1965 base is approximately three times higher than the 1923 base. In other words, a 3.3% increase from 1965 to 1966 would be approximately a 9.9% increase, if 1923 were the base year.

Basically judgments are paid in today's dollars. There is no evidence, and there is no law, to support the speculative and conjectural argument by which

cross-appellant seeks to have a judgment paid in today's dollars but to use 1990's amount of dollars.

B.

The lower court did not err in refusing to allow prejudgment interest.

The Hawaiian cases which have dealt with the measure of damages in death actions are *Kake v. Horton,* 2 Hawaii 209 (1860); *Ferreira v. Honolulu R.T. & L. Co.,* 16 Hawaii 615 (1905); *Wada v. Associated Oil Co.,* 27 Hawaii 671 (1924); *Enos v. Motor Coach Co.,* 34 Hawaii 5 (1936); *Gabriel v. Margah,* 37 Hawaii 571 (1947); *Ginoza v. Takai Electric Co.,* 40 Hawaii 691 (1955); and *Rohlfing v. Akiona, Ltd.,* 45 Hawaii 373 (1961).

In none of these cases has interest on the judgment prior to the date of judgment been allowed. The Hawaiian Statute on interest clearly contemplates that the interest shall be on the judgment recovered, and therefore, shall be post-judgment interest. It provides:

> "Interest at the rate of six percent per annum and no more, shall be allowed on any judgment recovered before any court in the Territory in any civil suit." Sec. 191-2, R.L.H. 1955.

C.

The lower court did not err in deducting estimated income taxes from decedent's anticipated future earnings.

The Hawaiian Statute on wrongful death actions provides:

> "In any such action under this section such damages may be given as under the circumstances

shall be deemed fair and just compensation, with reference to the pecuniary injury and loss of love and affection including (a) loss of society, companionship, comfort, consortium or protection, (b) loss of marital care, attention, advice or counsel, (c) loss of filial care or attention or (d) loss of parental care, training, guidance or education suffered as a result of the death of the person by the surviving spouse, children, father, mother, and by any person wholly or partly dependent upon the deceased person. The jury, or court sitting without jury, shall allocate the damages to the persons entitled thereto in its verdict or judgment, and any damage recovered under this section, except for reasonable expenses of last illness and burial, shall not constitute a part of the estate of the deceased. If an action is brought pursuant to this section and a separate action brought pursuant to Section 246-6, such actions may be consolidated for trial on the motion of any interested party, and a separate verdict, report or decision may be rendered as to each right of action. Any action brought under this section shall be commenced within two years from the date of death of such injured person." Sec. 246-2, R.L.H 1955.

The appeal in this case was taken only by Betty K. Furumizo individually. The injuries to her, and for that matter, to her infant daughter are obviously measured only after income taxes have been deducted.

This is not the injection of a collateral matter such as was present in the case of *Kawamoto v. Yasutaka*, 49 Hawaii 42 (1966) where the court stated that the

question of income taxes should not be injected into the case for the consideration of the jury. Here we are considering, not what Robert Furumizo might have earned during his life, but what the cross-appellant lost as a result of his death. She obviously did not lose the amount of taxes which would have been paid to the Federal government since she would never have had them anyway, anymore than she lost the amount of decedent's personal expenses. See *Ginoza v. Takai Electric Co.,* 40 Hawaii 691 (1955). Therefore, under the decisions of this court, *Southern Pacific Co. v. Guthrie,* 186 Fed. 2d 926, C.A. 9, Certiorari Denied, 341 U.S. 904 and other cases there cited, and under the decisions in such cases as *O'Connor v. U. S.,* 269 Fed. 2d 578, C.A. 2; *Moffa v. Perkins Trucking Co.,* 200 Fed. Supp. 183 (Conn.); and under the Hawaiian Statute, the cross-appellant here is not entitled to the amount of income taxes which would have been paid to the Federal government, either from Baker or from the Federal government.

The defendant, United States, points out that under the Tort Claims Act it cannot be held liable for the amount of income taxes. The anomalous situation here is that if Baker is held liable, the United States does not get the money, but the cross-appellant does. This defies logic and reason. Obviously, the decision of the court below was correct.

D.

The court did not err in refusing to allow the $250 portion of reasonable burial costs paid by the Veterans Administration as to cross-appellant, Baker Aircraft Sales, Inc.

Regardless of the argument that is made by the cross-appellant, the fact is she joined and made the self-same claims against both of the defendants and their cases should stand on an equal footing. Moreover, the fact remains that she did not appeal in her capacity as administratrix of her deceased husband's estate, and under the Hawaiian Statute, burial expenses are recoverable by the estate. Section 246-2, R.L.H. 1955. Therefore, there can be no reversal for this disallowance.

E.

There was no error in the court's approach to the overall question of determination of the amount of damages.

Cross-appellant has urged that the court erred in trying to place itself in the position of the ordinary juryman in considering the case and in taking into consideration the favorable prospects of remarriage, employment, health and earning capacity of cross-appellant, Betty Furumizo. Obviously, these are common sense matters which a court would have to take into consideration in determining the kinds of damage and the pecuniary value thereof under the provisions of the Hawaiian Death Statute. Favorable prospects for remarriage, good health, employment, etc., all bear on the elements of loss of society, marital care, etc. Any judge must, in attempting to arrive at a fair and just amount of compensation, take into

consideration the standards of the community. This is all that has been done here.

If this approach by the trial judge is erroneous, then the judgment must be set aside and a new trial granted on the overall issue of damages.

Cross-appellee, Baker Aircraft Sales, Inc., has argued that the amount of damages awarded was excessive, and obviously would therefore be willing to have the whole question of damages retried, if this is what cross-appellant has in mind.

V. CONCLUSION

For the reasons stated above, the cross-appeal should be dismissed and the cause reversed for disposition as prayed in appellant Baker's opening brief.

Dated, Honolulu, Hawaii,
November 26, 1966.

Respectfully submitted,
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PADGETT AND GREELEY,
Of Counsel.

Certificate of Counsel

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Frank D. Padgett